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No 2 Misc.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT, Respondent.

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS BELOW

The Judicial Council's order, dated December 13, 1965, *In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* is not reported but is set out as Exhibit A in the Appendix to the petition for a writ of prohibition and/or mandamus at pp. i-iii. The Judicial Council's order, dated February 4, 1966, apportioning the judicial business of the District Court for the Western District of Oklahoma, is at pp. 10-16 of Memorandum filed on behalf of Respondent, on file herein. The minutes of the September 14, 1967 meeting

of the Judicial Council, and attachments thereto, finding that no further action by the Council is either necessary or appropriate, is on file with the Clerk of this Court.

JURISDICTION

The jurisdiction of the Court is invoked under the All Writs Act, 28 U.S.C. 1651(a) and under the Court's inherent powers. The Judicial Council, through what developed as a single, integrated act, first stripped Judge Chandler of all his judicial powers and then, through successive orders, restored to him part of his judicial powers, but only that amount deemed necessary by the Judicial Council for its act to escape review by this Court. The Council's extended but single act affects sufficiently matters within this Court's appellate jurisdiction to bring this application for extraordinary relief within the All Writs Act.

Petitioner could not present the argument in support of jurisdiction better than did Solicitor General Griswold, in his Brief *amicus curiae*, pp. 14-31, and accordingly adopts such argument as his own.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the following constitutional provisions:

1. Article I, Section 2, clause 5

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

2. Article I, Section 3, clauses 6 and 7

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath of Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And

no person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to law.

3. Article III, Section 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

4. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This petition involves the following statutory provisions:

1. 28 U.S.C., § 1651(a), 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate

in aid of their respective jurisidctions and agreeable to the usages and principles of law.

2. 28 U.S.C., § 137, 62 Stat. 897

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

3. 28 U.S.C. § 332, 62 Stat. 902, and 28 U.S.C., 1940 ed., § 448 (Mar. 3, 1911, c. 231, § 306, as added Aug. 7, 1939, c. 501, § 1, 53 Stat. 1223.

These two statutes are set forth herein under Argument, page 13.

QUESTIONS PRESENTED

1. When a Judicial Council orders a federal district judge to take no action whatsoever in any case or proceeding then or thereafter pending in the federal district judge's court, has the Judicial Council exceeded its jurisdictional authority as conferred by 28 U.S.C. § 332 or limited by the Constitution?

2. When a Judicial Council initially seeks under 28 U.S.C. 332 to strip from a district judge all his powers to hear cases but, upon being hailed before this Court, restores part of these powers while withholding the rest under a pretext of acting pursuant to 28 U.S.C. 137, has the Judicial Council cured any defects in its statutory or constitutional authority to strip powers from the federal judge?

STATEMENT OF THE CASE

On December 13, 1965, the Judicial Council of the Tenth Circuit of the United States met in special session at Denver, Colorado.

The purpose of the special session, according to an Order (Exhibit A of the Appendix to the petition for a Writ of prohibition and/or mandamus) made at the Session, was to review the effect of Chief Judge Stephen Chandler on the business of the United States District Court for the Western District of Oklahoma.

Judge Chandler was given no notice of the calling of the Special Session or of its purpose. He was given no opportunity to be present during the deliberations of the Special Session, no opportunity to hear the nature of any complaint about him, no opportunity to rebut complaints, cross-examine accusers, or present explanations or evidence in his own behalf, and no opportunity to be represented at the Special Session by counsel.

The Judicial Council, at its special session, made an Order finding that Judge Chandler was presently unable or unwilling to discharge efficiently the duties of his office. The Order stated that, until the further order of the Judicial Council, Judge Chandler was stripped of his power and authority to hear and decide cases or take any action whatsoever in all cases or proceedings then or thereafter pending in his Court.

The Order cited, as specific reasons justifying this finding and Order, that during the past four years Judge Chandler had been a party defendant in both civil and criminal litigation, of which one civil case was still pending, and that two proceedings had been brought in a United States Court of Appeals to disqualify Judge Chandler from handling specific litigation, in one of which proceedings he was ordered to proceed no further and in the other proceeding the matter was still pending.

Other than these specific reasons, nothing was cited to justify the Order except a vague reference to "the entire situation" and to "the attitude and conduct of Judge Chandler" as they affect the business of his Court.

The Order was not filed, made public or its terms made known to Judge Chandler for two weeks, although rumors of the entry of a punitive order circulated. It was finally filed in the United States Court of Appeals for the Tenth Circuit on December 27, 1965, and in the United States District Court for the Western District of Oklahoma on December 28, 1965.

On January 6, 1966, petitioner filed with this Court a motion for leave to file a petition for a writ of mandamus and/or prohibition directed to the Judicial Circuit. Petitioner also applied for a stay of the Judicial Council's order.

In opposing Judge Chandler's Application for Stay, the Judicial Council, through its counsel, Solicitor General Thurgood Marshall, referred darkly to some matters on file, suggested that a third statute, 28 U.S.C. § 272 (b), was also available as authority for the Judicial Council's assault upon Judge Chandler (thus implicitly charging that Judge Chandler was mentally disabled), and asserted that "public confidence in the federal judiciary would inevitably be impaired if Judge Chandler was allowed to preside over the District Court" during these proceedings. The Judicial Council also represented to this Court that the order was "entirely interlocutory in character," that the Council had "intended to permit" Judge Chandler to be heard, that "upon a request by Judge Chandler" the Council would promptly conduct a hearing, and that "at these proceedings, the Council contemplates that Judge Chandler will, if he wishes, appear before the Council."

This Court, while expressing "no opinion concerning the propriety of the interlocutory action taken" by the Council, denied the Application for a Stay "pending this contemplated prompt action of the Judicial Council."

Judge Chandler quickly notified this Court and the Judicial Council that he would neither request nor attend a hearing conducted by a body whose jurisidction he challenged, and he urgently renewed his application for Stay of the Council's Order.

The Judicial Council thereafter held its second secret session and issued a most bizarre "order." A "hearing" was ordered for February 10, 1966, at Oklahoma City, but no person, including Judge Chandler, was ordered to attend. The subject matter of the hearing was not even given, but Judge Chandler was advised he "may appear in person and with counsel and present such matters to the Council as he may deem fit."

Judge Chandler announced his refusal to attend this strange "hearing", confident that this was not the type of proceeding Solicitor General Marshall and this Court had understood would be held.

At this point, the other judges of Judge Chandler's court, noting the poor prospects for a speedy determination of Judge Chandler's rights to hear cases, felt it their duty to advise Judge Chandler that the Judicial Council's Order of December 13, 1965 not only stripped him of his powers but ordered that all the judges of their court enter into a new order dividing the court's cases (including the cases already assigned to Judge Chandler) among all the judges except Judge Chandler.

It was at this time that Judge Chandler detected how cleverly the first order had been constructed: If he agreed to a division of his cases, it could be said he acquiesced in the Council's Order. But if he disagreed, the Council could refer to such disagreement as conferring jurisdiction upon it under the provisions of 28 U.S.C. § 137.

Judge Chandler wished to avoid at any cost action which might appear to cure the jurisdictional problems of the Judicial Council. After careful consideration, he concluded

his best strategy required that he should go along with the other district judges with respect to the assignment of new cases in his court, but that he should stand firm and refuse to give up those cases already pending before him and moving along in the judicial process when the first order was filed. He reached this conclusion after a careful study of 28 U.S.C. § 137 convinced him such statute refers only to newly filed cases and not to cases already assigned to judges.

Soon thereafter, a third secret and special session was held by the Judicial Council, and a third order was issued. This order cancelled the hearing, restored to Judge Chandler his powers with respect to his old cases, noted his disagreement with his colleagues with respect to these old cases and cited this as its authority to divide all new cases among the other judges, and stated that the first order was superseded.

Soon thereafter, in February 1966, Solicitor General Marshall, in his Memorandum for Respondent, suggested the case had become moot, because of the Council's third order. This suggestion was contested by petitioner, and Solicitor General Marshall, in his Supplemental Memorandum for Respondent, agreed in a footnote that the case was not moot. More important, it was in this Supplemental Memorandum for Respondent that the Judicial Council revealed its newest strategy: it would thenceforth suppress Judge Chandler's judicial powers under the guise of helping him clean up a crowded docket, action superficially more compatible with the provisions of 28 U.S.C. 137 than with those of 28 U.S.C. 332. The Supplemental Memorandum for Respondent was crammed with poppycock suggesting that Judge Chandler had expressed a "wish to dispose of his current docket", that "the condition of Judge Chandler's docket made it advisable that he substantially reduce his docket before undertaking new judicial business," that "it is not clear from petitioner's reply whether Judge Chandler is, in fact, willing and able to take on the assignment of new cases at the present time," and that "the Court . . .

retain [ ] the case upon its docket until such time as the Council acts upon any future certification by Judge Chandler of his readiness to participate in the assignment of new cases."

Petitioner, in Petitioner's Reply to Supplemental Memorandum for Respondent, attempted to point out to the Court that the first order of the Judicial Council had recited quite different grounds as supporting the stripping of Judge Chandler's judicial powers and that the Court should not be misled concerning the true intent of the Judicial Council, which was to restrict to the fullest extent possible the power of Judge Chandler to hear or decide cases.

Apparently, the Court adopted Solicitor General Marshall's suggestions, for it did nothing for a considerable period of time, fifteen months in fact, during the last seven months of which period the Judicial Council, with a perfectly straight face, went through the motions of creating a written record of its concern with and attention to the state of Judge Chandler's docket. The Judicial Council even obtained from the Administrative Office of the United States Courts a considerable body of statistics concerning Judge Chandler's disposition of cases on his docket, which statistics it apparently was hoped would support the Council's belated claim of acting to help Judge Chandler clean up his docket, but the statistics failed to do so.

At the conclusion of this fifteen month period, the Clerk of the Court, at the Court's direction, wrote to the parties seeking information concerning the status of the case, saying that the Justices

> "were uncertain as to what had occurred since we were last in touch with you. Would you be good enough to inform us as to any events which may have occurred since your papers were filed and any views you may have as to the effect of such events on the pending proceedings."

Shortly thereafter, the Judicial Council convened, noted that Judge Chandler had only twelve cases pending, and requested the judges of Judge Chandler's court to consider and agree upon a new division of business in their court. Judge Chandler, in a letter to his colleague judges, pointed out that the Judicial Council was begging them to take action that the Council hoped might moot this case and thereby spare all Judicial Councils the unpleasantness of losing their supposed disciplinary powers, which could result from the adjudication of this case. Judge Chandler also pointed out to the other judges of his court:

> "Nor is this letter a plea for any particular action on your part. I believe each judge must be left free to consult only with his God and then do what he thinks is fair and decent and right."

For reasons known only to each judge, but through acts beyond the control of Judge Chandler, the five judges of Judge Chandler's court each signed a letter addressed to the Judicial Council advising "that the current order for the division of business in this district is agreeable under the circumstances," Thereby maintaining in force the February 4, 1966 division-of-business order forced upon them by the Judicial Council, which order deprives Judge Chandler of any power to hear cases other than those on his docket prior to the entry of the Council's original order of December 13, 1965.

The Judicial Council soon reconvened and concluded that "no action of the Council is either necessary or appropriate at this time." The February 4, 1966 division-of-business order continued to remain in effect. In June 1969, Judge Chandler filed a Motion to Advance. On June 16, 1969, the Court denied this motion but set the cause for oral argument at the beginning of the 1969 Term, nearly four years after the commencement of this action.

ARGUMENT

The Judicial Council has pursued, singlemindedly, since December 1965 a course of action calculated to deprive Judge Chandler of the powers of his judicial office to hear and decide cases.

Initially, with the filing of the Order of December 13, 1965, the deprivation was intended to extend to all cases, cases already in his court or to be filed in his court. The procedures and manner chosen by the Council to attack Judge Chandler's powers were so shocking to the bench, bar and public, particularly because of the Council's disregard of all due process of law requirements, that the Council was forced to remold its attack into more socially acceptable forms. This necessitated limiting the attack to a deprivation only of Judge Chandler's powers to hear and decide cases filed in his court in the future.

The niceties of the Council's remolding the more limited attack involved, successively, (1) brief homage paid to public sensibilities concerning fair hearings and due process of law, (2) abandonment of reliance upon its disputed disciplinary powers (28 U.S.C. 332) as authority for its attack in favor of reliance upon its peace-making powers (28 U.S.C. 137) under claim that a dispute existed with regard to a division of cases in Judge Chandler's court, (3) the further refinement of its attack by returning to 28 U.S.C. 332 but this time under invocation of that statute's legitimate housekeeping powers, claiming that all along it had been concerned with a crowded docket problem, (4) a request for more time in the hope that such time would see Judge Chandler resign from the bench or from life, and (5) the offering of a reprieve to Judge Chandler when the duration of the sustained attack could no longer be maintained under any form of make believe, which reprieve was not within Judge Chandler's sole power to accept and which was refused by the five district judges who together could have accepted it.

The original order depriving Judge Chandler of all his powers was based, according to the Council itself, upon the

power and authority vested in the Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. 332. The legislative history of this statute does not support this assertion.

It should initially be noted that the Act of June 25, 1948, 62 Stat. 902 was only a revision of Title 28, United States Code, was not intended to change the law existing then but only to organize it better to eliminate obsolete or revoked statutes, and to clarify any awkwardly expressed but understood intentions. House Report No. 308, 80th Congress.

The true legislative history of 28 U.S.C. § 332 is that of the Act of August 7, 1939, 53 Stat. 1223, which had as its purpose the establishment of the Administrative Office of the United States Courts and contained in its Section 306 the forerunner of today's 28 U.S.C. § 332.

The report of the Senate Committee on the Judiciary, Senate Report No. 426, 76th Congress, which accompanied the 1939 legislation, clearly shows that its main purpose was to transfer from the Attorney General to a newly created Administrative Office of the United States Court the burden of administration over every petty detail affecting the federal courts and that its second purpose was to provide administrative machinery whereby the lagging work of the courts could be expedited and kept up to date.

Seante Report No. 426, 76th Congress, and Section 306 of the Act of August 7, 1939, c. 501, 53 Stat. 1223, both tie the work of the Judicial Councils to the data-collecting and statistics-compiling duties of the Administrative Office of the United States Courts, and they tie the directive power of the Judicial Councils over district judges to the corrections of the delays and the administrative criticisms revealed in the quarterly reports of the Administrative Office.

This is far from the tyrannical powers the respondent arrogated to itself when it issued its purported Order against Judge Chandler.

It should further be noted that when the revisory legislation of 1948 was enacted, the revisers drastically altered the order of thoughts in 28 U.S.C., 1940 ed., § 448, relating to Judicial Councils, and the resulting section, today's 28 U.S.C. § 332, might appear to support plenary disciplinary powers over federal district judges by Judicial Councils. Compare carefully the violence done to the 1939 statute by the revised 1948 version:

1939 Statute

To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior circuit judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2), and such action shall be taken by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed.

1948 Revised Version

The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall atend all sessions of the council.

The council shall be known as the Judicial Council of the circuit.

The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The Council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Despite the violence done to the 1939 statute, the pertinent reviser's note revealed to Members of Congress voting on the 1948 revisory legislation only that "changes in phraseology were made" to 28 U.S.C., 1940 ed., § 448. House Report No. 308, 80th Congress. Surely, this lack of notice to the Congress of important restructuring of statutory language could not be the basis for altering the original congressional intention expressed in 1939, which intention by no stretch of the imagination embraced authority for the summary stripping of federal district judges' judicial powers by Judicial Councils.

The Judicial Council of the Tenth Circuit has clearly acted beyond the jurisdictional power given it by its creator, the Congress of the United States, as evidenced by a reading of the legislative history of 28 U.S.C., § 332. Since the Council, despite its many disguises, has never dropped its efforts to discipline Judge Chandler by withholding his powers to hear and decide cases, the original lack of legislative authority for the Council's claimed powers has tainted all that followed.

In addition, the Judicial Council has broken through the jurisdictional boundaries imposed upon the entire Judiciary by the Constitution and has penetrated deeply into the constitutional powers of the Congress.

Article I, Section 2, clause 5; and Article I, Section 3, clauses 6 and 7 of the Constitution confer upon the Congress the sole power of impeaching and trying federal officers for misbehavior. And Article III, Section 1 of the Constitution redoubles and focuses this congressional power in the instance of federal judges by guaranteeing that they shall hold their offices during good behavior. Impeachment by the Congress is the only way to strip a federal district judge of his office.

The Judicial Council, by its Order, has stripped Judge Chandler of his judicial authority and powers and left him only the shell of his office. The Constitution can not be so easily subverted. The office of a federal district judge

is not his office space, his desk, his robe hanging in a closet. The judicial powers—the authority to take action in cases and proceedings in his court—are a judge's office. The Judicial Council has removed Judge Chandler's office from him, and it thereby transgressed the impeachment powers of the Congress and deprived Judge Chandler of his Constitutional rights under Article III, Section 1.

Solicitor General Griswold, in his brief *amicus curiae,* p. 33, argues that the Constitution does not prevent Congress from providing procedures by which the courts could try the right of a judge to continue to hold office. But the Congress has not done this, even if it can and that question is not now before the Court. 28 U.S.C. § 332 has to be tortured to afford such an interpretation.

Judge Chandler was deprived of other constitutional rights, those guaranteed every citizen by the due process of law clause of Amendment V to the Constitution. He was deprived of liberty and property by secret and summary procedures so shocking that they recall those of the British Star Chamber.

He received no notice of the Judicial Council's special session, was not advised of the nature of the charges or complaints made against him, was not allowed to be present at the meeting, was not allowed to confront and cross-examine his discreditors, if any, was not permitted to present a defense or to be represented by counsel. The Order which issued from this proceeding attempts to reduce and confine Judge Chandler to a federal judge in name only. It cracks the whip and tells him what he can and cannot do. It attempts to take from him the meaning and worth and powers of his office. Surely, the Judicial Council can not cure its due process of law defects by a mere shift in posture that must be apparent to this Court.

Since the initial challenge by Judge Chandler of the Council's disciplinary action, many new defenses of this action have been advanced and many assumed postures have been corroborated. Let it not be forgotten that the Judicial

Council initially recited, as justifying the stripping from him of all his powers, that Judge Chandler had been a party defendant in both civil and criminal litigation and that two proceedings had been brought to disqualify him from handling specific litigation. There was no mention made of either a disagreement within Judge Chandler's court concerning the division of cases or a refusal of Judge Chandler to dispose of his cases. Surely, the Council would have latched on to something substantial such as this, had it been so, for this would have provided more solid support for the Council's action.

The truth is, the Council overlooked the possiblity that Judge Chandler would haul the Council before this Court for a review of its actions. Feeling the surge of a knock-out blow, the order of December 13, 1965 was drafted with a view to maximum destruction of Judge Chandler's reputation and standing within the community. Then, armed with this club and withholding only the filing of the order, the Council, through intermediaries, presented to Judge Chandler its ultimatum—retire or be ruined. He risked ruin, and the order was filed.

There has never to this day been a single attempt by the Council to justify its attack on Judge Chandler's powers on the original grounds relied upon, his involvement as a party defendant in civil and criminal litigation and two instances of disqualification by the Tenth Circuit from handling specific litigation. Since a scrutiny of the results of this litigation reveals a quashing of the misdemeanor indictment against him for failure of any crime having been committed and judgments in favor of Judge Chandler in the civil litigation, the Council must have sensed how futile it would have been to try to justify its attack on Judge Chandler upon these flimsy grounds. The order made good reading, though, and was given prominent display in the newspapers. Can men who initiate an assault so crudely command the presumption of this Court that they straightforwardly acted thereafter in conformance with a paper record later created?

Solicitor General Griswold argues the case has become moot. But, the Council's voluntary termination of illegal conduct does not deprive this Court of power to hear and determine this case. *United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894 (1953). A controversy remains to be settled, a dispute over the legality of the challenged practices. The Council is free to return to their old ways. Mooting can occur only if the Council can bear the heavy burden before this Court of demonstrating that there is no reasonable expectation that the wrong will be repeated. This, the Council has not done. Rather, it has demonstrated an unwillingness to deal openly with the true nature of its conduct.

CONCLUSION

The Judicial Council commenced, in December 1965, an attack on Judge Chandler's judicial powers. The attack never ceased, only abated. It was initiated without statutory or constitutional authorization. When its authority was challenged, the Council begged for time. Rituals were performed to corroborate more socially and legally acceptable reasons for the Council's attack, which continued. After two and a half years the Council offered to give up by offering to persons not a party to this action the ability to wash away the effects of the outstanding punitive order of February 4, 1966. These persons chose to do nothing and to await the outcome of this action. The case is not moot.

Judge Chandler is entitled to a writ of prohibition and/or mandamus, commanding the Judicial Council to cease act-

ing violation of its powers and in violation of Judge Chandler's rights as a federal judge and an American citizen.

Respectfully submitted,

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